No. 10,747

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ORVEY RAY TURNBEAUGH and DEVEINE FLOY TURNBEAUGH,

Appellants,

vs.

MARY A. SANTOS,

Appellee.

APPELLANTS' OPENING BRIEF.

ERNEST J. TORREGANO,
Mills Building, San Francisco,
Attorney for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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FACTS AND AUTHORITIES REGARDING JURISDICTION.

Appellants filed their voluntary petition in bankruptcy in the United States District Court for the Northern District of California on August 7, 1942, and were adjudged bankrupts on August 8, 1942. (Tr. pp. 2-3.)

The trustee in bankruptcy on October 15, 1942, filed a report setting aside the property claimed by them as exempt under the provisions of the Bankruptcy Act. (Tr. p. 9.)

On October 19, 1942, Mary A. Santos, a creditor, filed her objection to the trustee's report. (Tr. p. 5.) On April 21, 1943, the referee entered an order sustaining the creditor's objection and denying the bank-

rupts' exemption. (Tr. p. 19.) On April 30, 1943, the bankrupts filed a petition for review. (Tr. p. 25.) On March 3, 1944, the referee sent up his certificate upon the petition for review. (Tr. p. 26.)

On March 9, 1944, the district judge filed an order, without opinion, approving the referee's certificate and denying the bankrupts' claim of exemption. (Tr. p. 41.) On March 28, 1944, appellants filed their notice of appeal and undertaking for costs. (Tr. pp. 42-43.)

The proceedings were completed pursuant to Federal Rules 73-75.

The District Court had jurisdiction pursuant to Section 2a (10) of the Bankruptcy Act.

The Circuit Court of Appeals has jurisdiction of the appeal under and pursuant to Sections 24-25 of the Bankruptcy Act.

STATEMENT OF CASE.

The procedural steps which resulted in the denial of the appellants' claim to exemption appear in chronological order in the statement of facts and authorities regarding jurisdiction of this Court. The facts as uncontradictorily appear from the record are:

Appellants during the month of August, 1940, purchased the property described in their declaration of homestead. At that time it had no building thereon; subsequently the buildings were constructed. The first building upon the premises was a garage. The lumber for the building of the garage was delivered October 31, 1940. The garage was built in a little less than two

weeks' time. The size of the garage is 22 x 24. On November 15 appellants were living on the premises, husband and wife. (Tr. p. 46.)

They had a three-piece bedroom suite, springs, an inner-springs mattress, a library table and two rugs which were moved to the garage premises November 14, having been purchased from the Majestic Furniture Co., Modesto. (Tr. p. 47.)

They ate their lunch and had warm coffee during the time they were working on the place. The rest of their meals were eaten in restaurants. (Tr. p. 49.)

Their children lived at a rented place until the house was built on the homestead premises; they moved the children to the homestead premises on February 9, 1941. (Tr. p. 52.)

The children visited them on the homestead premises and took their lunch with them when they happened to be there. (Tr. p. 55.)

After they added the other improvements besides the garage, they had a six-room frame house with a bathroom, pressure system, electrical fixtures and all that sort of thing and landscaped it afterwards. (Tr. p. 61.)

The property was purchased through the Guaranty & Title Co. of Stockton and when they finished the deal on October 15 and got their deed, the husband said he wanted to put a homestead on the place and Mr. Galt of the Guaranty & Title Co. said, "You absolutely can't put a homestead there without living there." So he gave them thirty days to put the building up

and sleep there and that is the reason that the first and only night they slept there prior to November 15, 1940, was the 14th so that the 15th would be the thirty days. (Tr. p. 66.)

The only person who advised them regarding the homestead was Mr. Roy Galt, manager of the Guaranty & Title Co., Stockton. (Tr. p. 73.)

On November 14, 1940, between seven and eight o'clock in the evening a friend, Florence McGirk, visited them at the garage premises. (Tr. p. 94.) She saw the bedroom suite and that they had their bed made and were ready to stay there that night. (Tr. p. 95.) Appellants told Florence McGirk that the place was to be their garage when the house was finished. (Tr. p. 99.)

Mrs. Clarice Thiemann, a neighbor, saw the garage being built and during November, before Thanksgiving, she saw lights in there and a car and she visited them during the latter part of November in the garage quarters to collect for the Red Cross Roll Call and observed that it was very crowded and she felt embarrassed to accept Deveine Floy Turnbeaugh's, one of the appellants, invitation to come in. (Tr. p. 111.) From her breakfast nook she could see lights in the garage in the evening. (Tr. p. 112.) She saw them working about the place and she would say that it took about three weeks to build the garage. (Tr. p. 115.)

During the month of November, 1940, Clem Mulholland visited appellants at night time during the time the garage was being built for the purpose of

delivering a message to them to come to the telephone. (Tr. p. 121.) When he called at the building appellants were inside because he had to knock on the door. He tooted the horn and the appellant, Orvey Ray Turnbeaugh, turned on the light and he then told him that they were wanted on the telephone. (Tr. p. 122.) Appellant Orvey Ray Turnbeaugh told him that he would come as soon as he got dressed. (Tr. p. 123.) The next time that he was in the garage he observed that they had a bed in there. (Tr. p. 124.) They had also a sort of rug or something over their cement floor and had some kind of a stove, heating apparatus; but they had no electricity, they had a coal oil lamp. (Tr. p. 125.) He remembered definitely of going out that night and driving two miles up the road to deliver the telephone message and he was there when appellant Orvey Ray Turnbeaugh spoke. (Tr. p. 134.) The conversation was with the son and was in reference to materials. (Tr. p. 135.)

QUESTIONS INVOLVED.

(1) Was the order of the district judge denying the homestead claim of exemption contrary to law?

(2) Was the order of the referee, confirmed by the district judge, holding that the bankrupts were not actually residing upon the premises when they recorded the declaration of homestead sustainable under the facts and the record?

(3) Did the district judge err in confirming the order of the referee denying the bankrupts' claim to

their homestead exemption when the record of the undisputed evidence affirmatively proved that the bankrupts prior to and ever since the commencement of the bankruptcy proceedings actually resided on the premises claimed as homestead and recorded their declaration of homestead as required under the laws of the State of California?

(4) Was the denial of the bankrupts' claim to a homestead exemption under the facts presented by the records contrary to law and equity?

ARGUMENT.

POINT 1.

WAS THE ORDER OF THE DISTRICT JUDGE DENYING THE HOMESTEAD CLAIM OF EXEMPTION CONTRARY TO LAW?

The Bankruptcy Act in so far as it is pertinent to the consideration of this appeal requires the trustee and the Court to set aside to the bankrupts, the exemptions allowed under the state law:

> "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the state laws in force at the time of the filing of the Petition in the state wherein they have had their domicile for the six months immediately preceding filing of the Petition or for a longer portion of such six months than in any other state * * *"
>
> *Bankruptcy Act,* Sec. 6 (U.S. Code Title 11, Chapt. 3, Sec. 24.)

The law of homestead in the State of California and under which the bankrupts are entitled to have the

Bankruptcy Court set aside their exemption of a homestead claimed under such law is found under Title V, Homesteads, Sections 1237-1269, inclusive, of the Civil Code.

Text writers and the Court have repeatedly enunciated the rule that homestead and exemption laws are remedial statutes and must be given liberal construction.

> "Although homestead rights are purely creatures of statutes, it has been frequently stated that the homestead statute should be given a liberal construction in favor of the exemptions because it is a remedial and beneficial law and has an object of humane character."
>
> *Cal. Juris.,* Vol. 13, p. 426.

> "Public policy wisely looks to preservation and seeks means to prevent the breaking up of families and homes. Such public policy is declared in the Constitution and is furthered by homestead legislation exempting homesteads occupied by families from the hammer of the executioner. The policy of the homestead law has been to be humane and benevolent or benign. Its object is to secure to every housekeeper with a family the certain and uninterrupted enjoyment of a homestead to provide a place for the family and its surviving members where they may reside and enjoy the comforts of the home free from any anxiety that it shall be taken from them against their will by creditors."
>
> (Id. p. 431.)

> "Homestead statutes are remedial. In interpreting them, the Court should, if it can reason-

ably do so under the concrete factual situation, make secure to the claimant all the domiciliary protection and immunity which his homestead attaches to the title."

Re: Miller, 27 Fed. Supp. 999.

POINT 2.

WAS THE ORDER OF THE REFEREE, CONFIRMED BY THE DISTRICT JUDGE, HOLDING THAT THE BANKRUPTS WERE NOT ACTUALLY RESIDING UPON THE PREMISES WHEN THEY RECORDED THE DECLARATION OF HOMESTEAD SUSTAINABLE UNDER THE FACTS AND THE RECORDS?

The validity of the homestead claimed by appellants is challenged upon the grounds that the appellants did not actually reside upon the premises. Such challenge, however, finds no support in the record. The evidence introduced uncontradictorily proves that the appellants have continuously actually resided upon the premises. The harshness of the rule sought to be invoked by the referee, and confirmed by the district judge without his own views thereon, being expressed in a memorandum opinion, may be briefly summarized to the effect that it is necessary for a particular character of dwelling to be occupied by a homesteader in order to enable him to claim such premises as exempt; otherwise under the reasoning adopted by the referee and approved by the district judge, even if a homesteader sees fit to go through the hardships of living in a dwelling which does not come up to all the modern conveniences which others may be more fortunate to have, such manner of abode negatives the sworn un-

contradictory testimony of the actual residence claimed by the homesteaders.

It is also proper to approach at this point a discussion of the referee's memorandum opinion. With due respect to the learned referee, it is disclosed that in order to arrive at his erroneous conclusion he has incorporated in his opinion many matters which are not sustained by the record. For instance, the referee states:

> "The claim of the bankrupts is fantastic. Is it credible that throughout a cold, dreary, wet winter, with chilling winds and driving rains and frost, that claimants lived in a garage without any ordinary facilities of living when they had a warm, comfortable, well-furnished home, with a family of young children, a mile and a quarter away? Can one imagine refined people like these dressing and undressing on a cold concrete floor in the dampness of winter nights;" etc. (Tr. p. 34.)

The referee has injected into his reasoning an element which does not appear in the records. No one testified that during the period of time the bankrupts resided in the garage it was "a cold, dreary, wet winter with chilling winds and driving rains and frost". As a matter of fact the evidence was exactly the contrary. Witness Florence McGirk testified as follows:

> "Q. What kind of a night was it?
> A. It was clear; it wasn't a rainy night.
> Q. A clear night?
> A. Yes.

Q. No rain?
A. I don't believe so.
Q. No fog?
A. Probably; might have been a fog, but I don't remember about that." (Tr. p. 108.)

The referee failed to add in his observations quoted above that on the concrete floor was a rug or covering. The testimony to that effect was as follows:

Clem V. Mulholland testified:

"Q. All right. Now, what did you observe when you were there on that occasion?
A. Well, there was a bed there and they had a sort of a rug or something over their cement floors. It was built for a garage, and there was a cement floor on it." (Tr. p. 125.)

This appeal does not involve a case where an owner of real property was attempting to conform with the statute merely to circumvent it but, on the contrary, the evidence discloses that the bankrupts knew that they had to reside on the premises in order to establish a valid homestead and therefore when they purchased the property in question they were so advised by Mr. Roy Galt, the manager of the Stockton Guaranty Title Company.

The testimony of Deveine Floy Turnbeaugh is as follows:

"Q. Where was it executed?
A. Why, in Mr. Galt's office in—— * * *
Q. Stockton?
A. Guaranty—Guaranty & Title.

Q. I take it that you came in and discussed this declaration of homestead with him before you prepared it?

A. We had spoke—I suppose I can go into detail?

Q. Yes, I want you to, please.

A. On the 15th of October we finished up our deal, got our deed, and my husband said he wanted to put a homestead on the place, and he says, 'You absolutely can't put a homestead there without living there.'

Q. I see.

A. Sleeping there. So he gave us thirty days to put that building up and sleep there. That is the reason that we slept there the night of November the 14th, so the 15th would be our thirty days." (Tr. p. 66.)

"Q. Yes, you went to Mr. Roy Galt, who is manager of the Stockton Guaranty Title Company, didn't you?

A. Yes.

Q. And you counseled with him about putting on a homestead, didn't you?

A. We asked him about it, yes.

Q. Yes. And you understood him to be the manager of the Stockton Guaranty Title Company at the time?

A. And expected what he told us to be absolutely on the up and up.

Q. And you told him the facts?

A. Yes, sir.

Q. And it was upon the facts that you related to him that he advised you what to do, isn't that correct?

A. Yes, sir." (Tr. p. 73.)

POINT 3.

DID THE DISTRICT JUDGE ERR IN CONFIRMING THE ORDER OF THE REFEREE DENYING THE BANKRUPTS' CLAIM TO THEIR HOMESTEAD EXEMPTION WHEN THE RECORD OF THE UNDISPUTED EVIDENCE AFFIRMATIVELY PROVED THAT THE BANKRUPTS PRIOR TO AND EVER SINCE THE COMMENCEMENT OF THE BANKRUPTCY PROCEEDINGS ACTUALLY RESIDED ON THE PREMISES CLAIMED AS HOMESTEAD AND RECORDED THEIR DECLARATION OF HOMESTEAD AS REQUIRED UNDER THE LAWS OF THE STATE OF CALIFORNIA?

The referee in his memorandum of opinion thought it unusual that the appellants could convert the garage into a dwelling house and use same without facilities and that such contention on their part was fantastic. However, a case dealing with almost a similar situation was before the District Court of the Southern District of California and that Court did not find that situation to be so unusual as to create a presumption or an inference against the homestead claimants. We quote from that decision:

> "At that time the dwelling house on the smaller parcel was used as a place of residence for the family. On the larger parcel across the county road which was about 60 feet in width was a small house, a small building used as a place for the sale of merchandise and gasoline, a barn and nine small cabins. There was a well from which domestic water was obtained located at the side of the small store and filling station building. Toilet facilities were provided at the store building and were used by the family as well as others who were upon the grounds. The sewage was disposed of at a distance of about 120 feet from the toilets. * * * The Referee upon the facts concluded that

during all the time involved in this controversy, the bankrupt and her family used the premises in controversy primarily as a place of residence and that the entire premises were, during all the time involved in this controversy, and/or necessary and convenient for the use of the bankrupt and her family as a place of residence independent of the business conducted on said premises and that said business was incidental and subordinate to the use of the bankrupt and her family of said premises for a home; that the entire premises was impressed with the homestead."

In re: Shepardson, 28 F. (2d) 353, 12 A. B. R. (N. S.) 445.

(a) THE REFEREE'S ORDER HAS NO BINDING EFFECT EITHER UPON THE DISTRICT JUDGE OR THIS COURT.

In the instant case this Court is not confronted with the applicable decisions to the effect that findings of facts of a referee in bankruptcy when confirmed by the district judge should not be disturbed by the Appellate Court unless manifest errors appear therefrom.

The referee's order in the case before the Court is an order made without any findings of facts. It is true that the referee prior to the entry of his order filed an opinion; however, this does not constitute a findings of facts or conclusions of law.

"We regret the necessity of returning this matter to the excellent and careful Referee by whom the order * * * was made. The trouble with his report is that (no doubt from inadvertence) he does not find the ultimate facts of the dispute, but

practically confines himself to a summary of the testimony and a statement of his disbelief therein. But this is merely negative, and we need something definite * * * We need to know the facts, not merely the evidence about the facts; and this is emphasized by the mass of testimony that has been taken and by the fact that the Referee heard and saw the witnesses and is much better able to find the facts than we can possibly be."

Re: Turetz (D.C. Pa.), 205 Fed. 400, 29 A. B. R. 752.

In another case the Court said:

"This record is in rather an unsatisfactory shape; the Referee has found no facts and I have, therefore, to pass upon the evidence which has been returned by him, without any knowledge of the witnesses by which to judge of their credibility."

Re: Yost (D.C. Pa.), 117 Fed. 792, 9 A. B. R. 153.

"The Referee discusses the facts and evidence in his opinion but such opinion does not constitute a findings of facts and conclusions of law. Inter-State Circuit Inc. v. U. S., 304 U. S. 55, 56, 57, 58 S. Ct. 768, 82 L. ed. 1146. (See also opinion of Judge Woolsey of the Southern District of New York in the case of Detective Comics v. Burns Publication, Inc., et al., 28 Fed. Supp. 399. Decided April 7, 1939."

Re: Hill Stores Co., Inc., 28 Fed. Supp. 785, 41 A. B. R. (N. S.) 712.

The omission of findings of facts from the referee's order is important in this instance for the reason that a finding to the effect that appellants were not residing upon the premises would not be supported by the evidence.

The district judge's order confirming the referee's order of course falls in the same category because it also is not based upon any findings of facts.

(b) THE RECORD WITHOUT CONFLICT SHOWS THAT APPELLANTS, THE BANKRUPTS, ACTUALLY RESIDED UPON THE PREMISES CLAIMED AND SET APART AS A HOMESTEAD.

The record discloses that there is no conflict regarding the actual residence of the bankrupts on the premises declared as a homestead and their continual residence thereon notwithstanding the unsupported statement of the referee in his opinion that "the evidence is vague and conflicting as to whether bankrupts actually slept in the garage prior to and at the time of the declaration of homestead". Before we refer to the record which indisputably proves the bankrupts' actual residence we desire to refer to the referee's own appraisal of the evidence at the time of the hearing before him.

> "The Referee. The Court has stated that it is satisfied *that these people were sleeping there in that garage,* but that they maintained their home *where the children were,* and they ate, and all the family affairs were carried on at the other place.
>
> Mr. Snyder. That's right.
>
> The Referee. Now it is purely a legal question, I think. I would like to have some authority. *The facts seem to be clear enough.* I cannot see any

purpose for the introduction of more testimony however if Mr. O'Reilly wishes to put on any other witnesses *on any other point,* you might do so." (Tr. p. 148.) (Emphasis supplied.)

In view of the observation made by the referee during the hearing *"that the facts seem to be clear enough"* it is difficult to reconcile the statement in his opinion contained in the certificate sent to the district judge that "the evidence is vague and conflicting". (Tr. p. 33.)

At the hearing before the referee, he continually referred to the fact that the evidence was clear (Tr. pp. 141, 149, 150, 151, 152), but that the real question was a question of law.

"The Referee. I think the whole question is purely a question of law as to whether or not there—the mere fact of the father and mother having gone over for the very purpose of claiming a homestead——

Mr. Snyder. Do they have to do more than just sleep there?

The Referee. Yes, that is the point." (Tr. p. 150.)

"The Referee. * * * The whole question is as to the law. I would like to have you gentlemen enlighten me as to what the law is. You may have a case in point." (Tr. p. 151.)

The questions of law on which the referee apparently desired to be enlightened are supplied by the following cases:

The Supreme Court of the State of California in a leading case on the question of homestead uses this language:

> "Conceding as claimed for the appellant that he went back to the house for the purpose of qualifying himself to file a new declaration, still it does not follow that his residence was not actual. He had taken up his abode in the house and had slept there one night. His wife and child did not go with him but it was not absolutely necessary that they should. One may have an actual residence in a house though his family be away and he takes his meals elsewhere. Nor is the fact that he had slept there but one night decisive of the question. After making an actual residence upon the property, one may file a homestead upon it at the end of a day as well as at the end of a month or a year, so one may file and maintain a homestead upon property which is partially rented out or used for other purposes than his residence. (Ackley v. Chamberlain, 16 Cal. 181; Phelps v. Rooney, 9 Wis. 70.)"
>
> *Skinner v. Hall,* 69 Cal. at p. 198.

It is apparent therefore from *Skinner v. Hall,* supra, which has been followed in California that even though a person resides on the premises only one night he may nevertheless file a homestead as provided under Section 1237 of the Civil Code of the State of California.

> "Under the rule of liberal construction which it has repeatedly been held should be extended to our homestead laws, in every permissible case where the premises are the bona fide home of the

parties it should be held that the business conducted within the premises is not the paramount and principal purpose but that the home is the main thing and not the business. The fact that the declarants occupied different rooms in the building on different occasions is not of great importance."

McKay v. Gesford, 163 Cal. 243.

See also

Heathman v. Holmes, 94 Cal. 291.

The record discloses that the referee expressed himself as satisfied that the appellants were actually sleeping on the premises.

"The Referee. Have you any witnesses?

Mr. O'Reilly. On this question of their sleeping there?

The Referee. Yes.

Mr. O'Reilly. Yes.

The Referee. *Well I am satisfied that they were sleeping there.*

Mr. O'Reilly. During the whole time?

The Referee. *Yes, slept there every night probably.* (Emphasis supplied.)

Mr. Snyder. At least on the 14th which is a material matter.

The Referee. At least on the 14th.

Mr. O'Reilly. Then the Court is not convinced they were sleeping there all the time?" (Tr. p. 149.)

"The Referee. Well, they say so; they say so.

Mr. Snyder. But that is not material, John.

The Referee. And it hasn't been refuted that they were sleeping there." (Tr. p. 150.)

"Mr. O'Reilly. * * * If the Court is desirous of obtaining or hearing any more evidence of it——

The Referee. No.

Mr. O'Reilly (continuing). ——I shall be glad to introduce it.

The Referee. No, they stated they were sleeping in the garage, and they moved some furniture up from Modesto; at the same time they were still maintaining a home at the Gagas place where their children were living, they were doing their washing and they were eating their meals there, excepting their luncheon." (Tr. p. 151.)

* * * * * * *

"The Referee. The Court is of the opinion that they went there and probably unquestionably were told by Mr. Galt that they had to be actually residing there.

Mr. O'Reilly. If the Court requires Mr. Galt's testimony, I shall bring him up here.

The Referee. No, that is not necessary. Mr. Galt wouldn't know anything about it.

* * * * * * *

The Referee. There is no question about it in the Court's mind, there is no question about that. Now, if you have any other points, other than the matter of their sleeping there and having their furniture there on that night, and having their lunch there while he was building the house." (Tr. p. 152.)

* * * * * * *

"The Referee. I don't expect you to present all those facts but I would like to have you give me the law. That is what is going to determine this case." (Tr. p. 155.)

The elements which the referee was of the opinion supported his conclusion cannot give the appellee any comfort because the decisions cited by the referee do not support his conclusion.

In *Tromans v. Mahlmans,* 92 Cal. 108, 27 Pac. 1094, the Court correctly stated the rule that the actual residence required of a declarant must be real and not sham or pretended.

In *Lakas v. Archambault,* 38 Cal. App., pp. 371-372, the Court expressly stated that the evidence of intention was to be determined from the *evidence before it.* (Emphasis supplied.)

In *Bullis v. Stamford,* 178 Cal. 40, cited by the referee, the evidence showed that the husband not only by his solemn declaration of oath but every overt act indicated his intention as running with his physical presence to make Los Angeles his place of residence and not in Fresno as alleged in the declaration of homestead.

In *Johnson v. De Beck,* 198 Cal. 177, cited by the referee, the Court properly held that it was not bound to accept the mere testimony of the husband and wife as being conclusive as to their intention but as to whether or not they actually resided on the premises at the time of the declaration was a question of fact to be determined by the Court from the evidence before it.

The evidence before the referee not only included the testimony of the appellants, husband and wife, but testimony of other witnesses which corroborated them.

The declaration of homestead was also introduced in evidence and under the law is *prima facie* evidence of its content when it is verified.

Civil Code, Sec. 1263 (5).

Applying the cases which the referee has cited in his opinion to the facts in the instant case we find an entirely different situation. The physical actual residence on the homestead premises appears from the uncontradicted testimony of appellants and uncontradicted testimony of the witnesses who have corroborated them. Appellants' intention of an actual residence upon the premises consistently appears from their past, present and subsequent actions.

After the completion of the garage a six-room frame house with one bathroom and a pressure system and electrical fixtures was constructed. Appellants also landscaped the premises afterwards. (Tr. p. 61.)

It has been generally held that whether a party's removal constitutes a change of residence depends on his intention in making such removal or the *animo manendi.*

In re: Dean, 208 Fed. 1018-1019.

Likewise it is held that the test of "residence" is: Did one remove from his former residence with an intention to abandon the same and an intention of acquiring a new residence.

In re: Peterson's Guardianship, 229 N. W. 885-887, 119 Neb. 511.

Residence is a matter of intention. A minor cannot form such intention for himself.

In re: Cannon's Estate, 15 Pa. Co. Ct. R. 312-314.

"Residence" means a fixed abode but anything however short coupled with an intention will be sufficient.

Johnson v. Petty, 281 Pac. 276-279.

Where a person actually lives in a certain place with the intention of remaining there indefinitely, that place is his residence.

Marston v. Watson, 129 Pac. 611-612, 20 Cal. App. 465.

"Residence" is a place where a man's habitation is fixed without any present purpose of removing therefrom.

In re: Turcick (D.C. Pa.), 33 F. (2d) 364.

It has also been held that where a man's wife and children resided upon the homestead it fixes his residence there, although he may have taken but one meal a day and spent the rest of his time on another farm.

Marsden v. Troy (Tex.), 189 S. W. 960-965.

POINT 4.

WAS THE DENIAL OF THE BANKRUPTS' CLAIM TO A HOMESTEAD EXEMPTION UNDER THE FACTS PRESENTED BY THE RECORDS CONTRARY TO LAW AND EQUITY?

Our discussion of the record and the law in support of points 1, 2, and 3 amply give answer to the question propounded under the above point. The record affirmatively shows that to deny the appellants of their homestead exemption under the facts presented by the record would be contrary to law and equity. The record affirmatively shows that not only were the appellants living on the premises at the time the

declaration of homestead was filed but that they were living on the premises continuously thereafter and at the time of the hearing before the referee.

The exemption laws are not as harsh as the appellee and the lower Court contend. However, if there were any doubt in the referee's mind of the appellants' residence upon the premises at the time of the declaration of their homestead, certainly no doubt could exist in his mind at the time of the hearing because, as stated, the record affirmatively shows that they were residing upon the premises then.

We, of course, do not concede that there is anything in the record to sustain the referee's opinion or a finding, if one was made, to the effect that the appellants were not actually residing upon the premises as claimed but in furtherance of the humane policy of the law looking to the preservation of the homestead and the exemption claimed thereby, equity would have required the referee to have permitted the appellants to satisfy any doubt in his mind by permitting them to execute and record a new declaration. The trustee's rights under the amendment of the Bankruptcy Act, as it existed at the time of the hearing, did not foreclose the appellants from their homestead exemption. From what we have said, it therefore follows that the district judge in his consideration of the referee's certificate upon the petition for review should have remanded the matter back to the referee with direction to permit the appellants to comply with any requirement which the referee believed had not been complied with so as to entitle them to their exemption.

CONCLUSION.

Upon the record as made in these proceedings, we earnestly urge that the lower Court has erred and that the order of the district judge confirming the referee's certificate and denying the appellants their homestead exemption should be reversed and the matter remanded to the referee with directions to allow the appellants their exemption and, if necessary, to have such further proceedings before him as would enable the appellants to obtain the benefit of the Bankruptcy Act requiring that their homestead be set apart to them as exempt.

Dated, San Francisco,
July 19, 1944.

Respectfully submitted,
ERNEST J. TORREGANO,
Attorney for Appellants.